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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
Petitioners,
v.
STATE OF SOUTH DAKOTA and CITY OF OACOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE SAN MANUEL BAND OF MISSION INDIANS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. INTRODUCTION

The amicus curiae San Manuel Band of Mission Indians (hereinafter "San Manuel Band") files this brief in support of the United States Department of the Interior's Petition for a writ of certiorari, upon the written consent of all parties.

The court of appeal's decision, striking down a key provision of the Indian Reorganization Act, 25 U.S.C. section 465, on constitutional grounds, has potentially drastic implications for Indian Tribes across the nation. For the past 60 years, the Secretary of Interior's authority to take lands into trust for Indians under 25 U.S.C. section 465 has been fundamental to Tribes' very survival in this country. The court of appeal's decision would, if let stand, turn the clock back to an earlier time in this nation's history when federal policy sought extinction of Indian Tribes.

This brief first explains the interests of the amicus curiae San Manuel Band. It next raises four arguments, each of which independently warrant granting a writ of certiorari. First, the court of appeal unnecessarily decided a constitutional question. In so doing, the court adopted a statutory interpretation that created, rather than avoided, constitutional difficulties, and declined to adhere to this Court's well-established tenets of statutory interpretation in the field of federal Indian law. Second, ignoring this Court's precedents, the court of appeal failed to require that the Secretary prove that his decision to take land into trust for the Lower Brule Tribe is unreviewable under the Administrative Procedure Act, 5 U.S.C. sections 701-706 (hereinafter "APA"). Third, the court of appeal ignored the threshold question of whether federal power over Indian affairs is exclusively legislative, or is shared both by the President and Congress. Finally, the court of appeal erroneously held that section 465 is an unconstitutional delegation of legislative authority. Contrary to the court of appeal's view, the statute embodies Congress' choice of social policy, provides the Secretary of the Interior with an intelligible principle to guide his trust acquisition decisions, and provides ascertainable standards against which the Secretary's delegated discretion may be tested.

For these reasons, the San Manuel Band respectfully requests that this Court grant the United States Department of the Interior's petition for a writ of certiorari.

II. INTERESTS OF AMICUS CURIAE

The San Manuel Band is a federally-recognized Indian Tribe, located in southern California. *See* 58 Fed. Reg. 54364, 54368. The Band originally occupied, derived its economic support from, and dwelled upon hundreds of square miles of land, which included streams and fertile acreage. In the late 1800s, however, the federal government relocated the Band to a square mile reservation consisting principally of steep, dry mountainous terrain. It was only through the trust process that the Band was able to acquire a few acres of flat land just after the turn of the century. Pursuant to section 465 of the IRA, the Secretary of the Interior recently has taken additional land into trust for the Band's benefit on which the Band is constructing housing for its members. The Band also has several requests pending before the Secretary under section 465 to take additional lands into trust so that it can construct more tribal housing, a health care clinic, meeting and governmental office facilities, and a day care center. There is no other land on the reservation which would be suitable to meet those needs.

The Band thus has a substantial interest in defending the Secretary's authority to take lands into trust pursuant to the IRA.

III. ARGUMENT

A. The Court of Appeal Unnecessarily Decided a Constitutional Question

The court of appeal should have first decided the question of whether APA review was available. Such an analysis might well obviate the need to address the constitutional question of delegation of legislative authority. *See Zobrest v. Catalina Foothills School Dist.*, __ U.S. __, 113 S.Ct. 2462, 2471 (1993) ("obligation to avoid unnecessary adjudication of constitutional questions").[1]

A second, closely related, problem with the court of appeal's opinion is that it violates the time-honored rule that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent

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[1]This obligation is a "'self-imposed limitation on the exercise of this Court's jurisdiction [that] has an importance to the institution that transcends the significance of particular controversies.'" *Zobrest*, 113 S.Ct. at 2471 (*quoting City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294 (1982)).

of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).

Here, as the discussion below at section III(D) of this brief makes clear, the Secretary's decision to take lands into trust is plainly consistent with, not contrary to, Congress' "intent and purpose" in enacting the IRA, which was, *inter alia*, "'to rehabilitate the Indian's economic life ....'" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (*quoting* H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934)).

Related to this general rule of construction is the canon of federal Indian law, ignored by the court of appeal, which requires that "[a]mbiguities in federal law [be] construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980).

By ignoring these rules of construction and unnecessarily deciding a constitutional question while leaving statutory questions unexamined, the court of appeal "has so departed from the accepted and usual course of judicial proceeding ... as to call for an exercise of this Court's supervisory powers." S.Ct. R. 10(a).

B. The Court of Appeal Failed to Require the Secretary to Prove That His Decision Is Unreviewable Under the APA

Federal agency actions are presumptively subject to judicial review, and this presumption may only be overcome by specific statutory language or legislative history that reliably indicates congressional intent to preclude judicial review. *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984). The APA's "generous review provisions must be given a hospitable interpretation." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). Indeed, government agency defendants bear the burden of proving -- not merely asserting -- unreviewability by clear and convincing evidence. *See Barlow v. Collins*, 397 U.S. 159, 167 (1970); *Abbott Laboratories*, 387 U.S. at 141.

The court of appeal nevertheless erroneously found conclusive the Secretary's assertion that his decision to take lands into trust is unreviewable. *See South Dakota v. United States*, 69 F.3d at 880, 881-82, 886. Thus the court "decided an important federal question in a

way that conflicts with relevant decisions of this Court." S.Ct.R. 10(c).[2]

C. The Court of Appeal Ignored The Threshold Question of Whether Federal Power Over Indian Affairs Is Exclusively Legislative or Is Shared by The President And Congress

The court of appeal ignored the threshold question of whether the power to take land into trust for the benefit of Indian Tribes belongs exclusively to Congress. The court assumed, without discussing or deciding, that this power is exclusively legislative in nature. As the following discussion demonstrates, that unexamined assumption is incorrect.

The Court has recognized that certain powers are shared by both the legislative and executive branches of the federal government. *See United Stats ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950). In *United States ex rel. Knauff*, an alien war bride, who was excluded from the United States by the Attorney General, challenged the Act of 1941, 22 U.S.C. section 223, as, *inter alia*, an unconstitutional delegation of legislative authority. Rejecting this claim, the Court held that the exclusion of aliens was a fundamental act of sovereignty, and that "[t]he right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." 338 U.S. at 542. Thus "[w]hen Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power." *Id.*

While the Constitution grants Congress power over commerce with Indian Tribes, *see* U.S. Const., art. I, sec. 8, cl. 2, it also grants the executive branch the power to enter into treaties with Tribes. *See* U.S. Const., art. II, sec. 2. Thus the Court has recognized that federal power over Indian affairs is found both in the executive and legislative

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[2]Indeed, had the court of appeal required the Secretary to prove unreviewability, as *Barlow* and *Abbott Laboratories* teach, the Secretary might well have reassessed his position on the question, as in fact he since has. *See* Land Acquisitions (Nongaming), 61 Fed. Reg. 18,082 (1996) (to be codified at 25 C.F.R. 151.12), *reprinted at* Petitioners' Appendix, 64a-69a. The Secretary's new regulations highlight the significance of the court of appeal's deviation from precedent.

branches: "'Indian law' draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments ... form the backdrop for the intricate web of judicially made Indian law ...." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).

In *United States v. John*, 437 U.S. 634, 652-53 (1978), the Court referred to the dualistic nature of the federal power over Indian affairs:

> we do not agree that ***Congress and the Executive Branch*** have less power to deal with the affairs of the Mississippi Choctaws than with the affairs of other Indian groups. Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the ***federal power*** to deal with them.

Id. (emphasis added).

The Court has recognized the executive branch's significant power to deal with Indian affairs. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 180 (1982) ("Repeated decisions of the courts, numerous opinions of the Attorneys General, and the practice of years place beyond debate ... that the executive department of the government of the United States had plenary power to enforce [a Creek Nation permit tax] ... through the Secretary of the Interior and his subordinates, the Indian inspector, Indian agent, and Indian police"). And the Court has recognized that the federal government's "course of dealing" with Indians, including broken promises and treaties negotiated by the Executive branch, gives rise to a "duty of protection, and with it the power" to deal with Indian affairs. *United States v. Kagama*, 118 U.S. 375, 384 (1886).

The Court has repeatedly recognized that many Indian reservations were created, not by Congress or treaty, but by Executive Order.[3] And in *Sioux Tribe v. United States*, 316 U.S. 317 (1942), the

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[3] *See, e.g., United States v. Dion*, 476 U.S. 734, 745 n. 8 (1986) ("Indian reservations created by statute, agreement, or executive order normally carry with them the same implicit hunting rights as those created by treaty"); *Fisher v. District Court*, 424 U.S. 382, 386 n. 9 (1976) ("The Northern Cheyenne Indian Reservation was created by Executive Order"); *Antoine v. Washington*, 420 U.S. 194, 216 (1975) ("The original Coleville Reservation was created by Executive Order"); *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 (1949) ("An Indian reservation created by Executive Order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President"); *Spalding v. Chandler*, 160 U.S. 394, 403 (1896) ("When Indian reservations were created, either by treaty or executive order, the Indians held that land by the same character of title..."); *Ex parte Wilson*, 140 U.S. 575, 576 (1891) ("the White Mountain Indian Reservation ... was created in the first instance by order of the president").

Court noted that it had earlier "squarely held that even in the absence of express statutory authorization, it lay within the power of the President to withdraw lands from the public domain." *Id.* at 325. The Court also recognized that "[b]y 1855 the President had begun to withdraw public lands from sale by executive order for the specific purpose of establishing Indian reservations." *Id.*

Congress too has often recognized that Indian reservations have been lawfully created by executive order. *See, e.g.*, 25 U.S.C. secs. 63, 331, 398a, 398b, 398c, 398d, 398e, 461, 1773.[4] *See also* 25 U.S.C. sec. 71 (acknowledging tribal fishing rights created by executive order).

Congress' acquiescence in the executive branch's creation of Indian reservations further supports the San Manuel Band's view that the executive possesses authority to act in this area. *See Dames & Moore v. Regan*, 453 U.S. 654 (1981) (congressional acquiescence affirmed the President's power to take certain actions attempting to obtain the release of American hostages from Iran). In *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), the Court found that Congress had acquiesced in the President's practice of withdrawing public land that otherwise would have been open to private acquisition when doing so was in the public interest. The fact that Congress knew of and acquiesced in these actions raised "a presumption that the withdrawals had been made in pursuance of its consent or of a

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[4] *See also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 163 n. 5 (1982); *United States v. Payne*, 264 U.S. 446, 447 (1924); *Fairbanks v. United States*, 223 U.S. 215, 217 (1912); *In re Heff*, 197 U.S. 488, 490 (1905).

recognized administrative power of the Executive in the management of the public lands." *Midwest Oil Co.*, 236 U.S. at 474. Even the dissenters acknowledged that:

> The authority which may arise by implication, we think, must be limited to those purposes which Congress has itself recognized by either direct legislation or long-continued acquiescence as public purposes for which such withdrawals could be made by the Executive. That the President might, by virtue of this executive authority, take action to preserve public property, or, in aid of the execution of the laws, ***reserve tracts of land for definitely fixed public purposes, declared by Congress, such as military or Indian reservations, may be conceded*** ....

Id. at 505 (Day, J., dissenting) (emphasis added). And the dissent also recognized that the President's duty to "take care that the laws be faithfully executed," U.S. Const., art. 2, sec. 3, "is not limited to the enforcement of acts of Congress according to their express terms. It includes 'the rights and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution.'" *Midwest Oil Co.*, 236 U.S. at 505 (Day, J., dissenting) (*quoting* Cooley, *Constitutional Law*, 121; *Cunningham v. Neagle*, 135 U.S. 1 (1890)).[5]

The President's broad authority with respect to relations with other sovereign entities arises out of the Article II, section 2, powers relating to the President's treaty-making power, the right to appoint

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[5]Congressional acquiescence in the creation of Indian reservations in New Mexico and Arizona apparently ended with the enactment of 25 U.S.C. section 211, which provides that "No Indian reservation shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of New Mexico and Arizona, except by Congress." The constitutionality of section 211 has apparently never been challenged. In *Healing v. Jones*, 210 F. Supp. 125 (D.C. Ariz. 1962), the court held that this statute did not terminate the Secretary's authority, premised on an 1882 executive order, to settle additional individual Indians and Indian Tribes on a reservation established under that executive order. This Court affirmed the district court's decision in a per curiam opinion. *Healing*, 373 U.S. 758 (1963).

ambassadors, and the role as Commander-In-Chief. These powers, combined with the need to present a clear and unified national policy to other sovereign entities, gives the President a special role in implementing the nation's policies in relation to other sovereigns. The Court emphasized this special role in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

In *Curtiss-Wright*, Congress authorized the President to ban the sale of arms to countries engaged in a particular conflict, and President Roosevelt proclaimed such an embargo. Curtiss-Wright was charged with conspiring to sell arms to Bolivia, one of the countries to which the embargo extended. Curtiss-Wright challenged the joint resolution as being an unconstitutional delegation of legislative power. The Court upheld Congress' resolution and the embargo, emphasizing the President's role in dealing with other sovereign entities. *See id.* at 319-29.

The executive branch's special relationship with Indians and their lands dates to the earliest days of the union. In *Worcester v. Georgia*, 31 U.S. [6 Pet.] 515 (1832), the Court noted that "[t]o give effect to various treaties with [Indians], the power of the executive has frequently been exercised; and at one time General Washington expressed a firm determination to resort to military force to remove intruders from the Indian territories." *Id.* at 576. For more than 150 years, this Court has recognized that the United States possesses a connection so special with Indian tribes that it rises to the level of a trust relationship. *See, e.g.*, *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). This special relationship is evident in the statute at issue in this case:

> The provisions in the Indian Reorganization Act providing that the United States may take land in trust for Indian tribes is one manifestation of this special relationship since it allows the government to secure areas in which the Indian nations may operate as the semi-autonomous peoples the law recognizes them to be.

City of Sault Ste. Marie v. Andrus, 458 F. Supp. 465, 472-73 (D.C.D.C. 1978).

The executive branch's special role in dealing with other sovereigns, as illustrated by *Curtiss-Wright*, and the government's trust relationship with Indian Tribes, support the San Manuel Band's view

that the power to take lands into trust for Indian Tribes is not an exclusively legislative power.

If the power at issue is not solely a legislative power, there can be no unconstitutional delegation. *See United States ex rel Knauff*, 388 U.S. at 542. Thus the court of appeal "has decided an important federal question in a way that conflicts with relevant decisions of this Court." S.Ct. R. 10(c).

D. Section 465 of the IRA Is Not an Unconstitutional Delegation of Legislative Authority

As the above discussion makes clear, the Court need not reach the delegation issue in order to grant the United States' petition for a writ of certiorari. However, should the Court chose to examine that issue, it will find that the court of appeal erred, for the IRA does not unconstitutionally delegate legislative authority to the Secretary.

Congressional delegations of authority are constitutional "'if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (*quoting American Power & Light Co. v. S.E.C.*, 329 U.S. 90, 105 (1946)).

The first of these criteria – a clear policy -- undoubtedly exists in the IRA, which Congress enacted, in part, to "'conserve and develop Indian lands and resources ....'" *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 101 (1949). In other words, as noted above, Congress' "intent and purpose" in enacting the IRA, "was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (*quoting* H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934)). The IRA also clearly makes the Secretary responsible for its implementation, *see* 25 U.S.C. section 465, thus satisfying the second criteria outlined in *Mistretta*.

Contrary to the court of appeal's opinion, the IRA also satisfies the third criteria by delineating the boundaries of the Secretary's authority to take lands into trust. All that is required to satisfy this criteria is that the limits of the delegated authority be clear enough so that ***courts can determine whether the executive branch's actions are consistent with Congress' will***. *See Yakus v. United States*, 321 U.S. 414 (1944).

In *Yakus*, the Court held that the Emergency Price Control Act

of January 30, 1942,[6] did not involve an unconstitutional delegation of legislative power. The Court examined the sufficiency of the statutory "standards which are to guide the Administrator's exercise of his authority ...." *Yakus*, 321 U.S. at 420. The Court explained that:

> ***the only concern of courts is to ascertain whether the will of Congress has been obeyed***. This depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find but upon the determination whether the definition sufficiently marks the field within which the Administrator is to act so that ***it may be known whether he has kept within it in compliance with the legislative will***.... Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers.... Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that ***it would be impossible*** in a proper proceeding ***to ascertain whether the will of Congress has been obeyed***, would we be justified in overriding its choice of means for effecting its declared purpose ....

Id. at 425-26 (emphasis added). *See also OPP Cotton Mills, Inc. v. Administrator of Wage and Hour Division of Department of Labor*, 312 U.S. 126, 144 (1941);[7] *Pittsburgh Plate Glass Co. v. National Labor Relations Board*, 313 U.S. 146, 165-66 (1941) (National Labor

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[6]The Emergency Price Control Act, 56 Stat. 23, was codified at 50 U.S.C. App. Supp. II, sec. 901, *et seq*.

[7]*Opp Cotton Mills, Inc.*, held that the Fair Labor Standards Act, 29 U.S.C. secs. 201 *et seq.*, is not an unconstitutional delegation of legislative power. The Court noted that where "the standards set up for the guidance of the administrative agency, the procedure which it is directed to follow and the record of its action which is required by the statute to be kept or which is in fact preserved, are such that Congress, the courts and the public ***can ascertain whether the agency has conformed to the standards which Congress had prescribed, there is no failure of performance of the legislative function***." *Opp Cotton Mills, Inc.*, 312 U.S. at 144 (emphasis added).

Relations Act, 29 U.S.C. secs. 151, *et seq.*, is not an unconstitutional delegation of legislative authority).

In this case the Secretary took "commercial land in trust for the Lower Brule Tribe of Sioux Indians" so that the Tribe could "create an industrial park ...." *South Dakota v. United States Department of Labor*, 69 F.3d 878, 880 (8th Cir. 995). This acquisition is plainly "in compliance with the legislative will," *Yakus*, 321 U.S. at 420, given that Congress' purpose in the IRA was to "develop Indian land and resources," *Hynes*, 337 U.S. at 101, and "rehabilitate the Indian's economic life . . ." *Mescalero Apache Tribe*, 411 U.S. at 152.

The IRA is not a statute in which "Congress has attempted to abdicate, or to transfer to others, the essential legislative functions with which it is vested by the Constitution." *Currin v. Wallace*, 306 U.S. 1, 15 (1939) (upholding Tobacco Inspection Act, 7 U.S.C. secs. 511 *et seq.* against a claim of unconstitutional delegation of legislative authority). The Court has:

> always recognized that legislation must often be adapted to conditions involving details with which it is impracticable for the legislature to deal directly. We have said that --'the Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility.' *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). In such cases 'a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details.' *Wayman v. Southard*, [23 U.S.]10 Wheat. 1, 43 (1825).

Currin, 306 U.S. at 15.

In *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), the Court upheld the Communications Act of 1934, 47 U.S.C. secs. 151, *et seq.*, against a claim of unconstitutional delegation of

legislative authority. In that statute, Congress recognized that radio was a limited medium, such that not everyone who wanted to have a radio station could do so. Thus some method for choosing among interested persons needed to be devised, "[a]nd since Congress itself could not do this, it committed the task to the Commission." *National Broadcasting Co.*, 319 U.S. at 216.

The Court held that Congress provided adequate guidance by requiring that radio licenses be granted based on "'public interest, convenience, or necessary,' a criterion which 'is as concrete as the complicated factors for judgment in such a field of delegated authority permit.'" *Id.* (*quoting Federal Communications Comm. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940)). Certainly if the "public interest" is sufficient guidance for the granting of radio licenses, then so too is the "conserv[ation] and develop[ment] Indian lands and resources," *Hynes*, 337 U.S. at 101, and the "rehabilitat[ion of] the Indian's economic life," *Mescalero Apache Tribe*, 411 U.S. at 152, sufficient to guide the acquisition of Indian trust land.[8]

The court of appeal failed to recognize that so long as courts can "ascertain whether the will of congress has been obeyed," Yakus, 321 U.S. at 426, Congress has adequately set "the boundaries of ...

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[8]The only other case of which the San Manuel Band is aware that addresses the delegation issue in the context of section 465 of the IRA is *City of Sault Ste. Marie v. Andrus*, 458 F. Supp. 465 (D.C.D.C. 1978). In that case, the district court for the District of Columbia had little trouble dispensing of a claim that the statute at issue here was an unconstitutional delegation of legislative power:

> The delegation claim fails because, even though the acquisition of lands in trust is discretionary with the Secretary, see 25 U.S.C. sec. 465, the legislative history and the Act itself, providing as it does a definition of an Indian tribe, do provide adequate standards for the exercise of this discretion. This is not to intimate any opinion as to whether those standards have been met in this case. Rather, it is simply to demonstrate that the delegation theory lacks merit.

City of Sault Ste. Marie, 458 F. Supp. at 473.

delegated authority," *Mistretta*, 488 U.S. at 373. Thus the court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." S.Ct. R. 10(c).

1. The Court of Appeal Ignored the IRA's Context and Factual Background, Which Provide Adequate Standards Against Which Administrative Trust Acquisitions May Be Judged

Statutory standards "need not be tested in isolation. They derive much meaningful content from the purpose of the Act, its factual background, and the statutory context in which they appear." *American Power & Light Co. v. S.E.C.*, 329 U.S. 90, 104 (1946). A statutory criterion is "'not to be interpreted as setting up a standard so indefinite as to confer an unlimited power." *National Broadcasting Co.*, 319 U.S. at 216. Rather, a standard "is to be interpreted by its context ....'" *Id.* (citations omitted). *See also Carlson v. Landon*, 342 U.S. 524, 542 (1952) ("the entire Act is to be looked at and the meaning of the words determined by their surroundings and connections").

The IRA marked a fundamental change in federal Indian policy, in reaction to the allotment policy embodied in the General Allotment Act of 1887, 25 U.S.C. sections 331 *et seq.* The allotment policy presumed that the "destruction of the tribal system was inevitable," and that "termination of tribal life was necessary if the Indian was to participate fully in the American system." F. Cohen, *Handbook of Federal Indian Law*, 131 (1982 ed.) (hereinafter *Cohen*). Allotments of land to individual Indians "were used as a method of terminating tribal existence." *Id.* at 130.

The strategy nearly worked. "The majority of Indian lands passed from native ownership under the allotment policy." *Id.* at 138. In 1887, the year the General Allotment Act was passed, Indian lands totaled approximately 138 million acres. That figure dwindled to 48 million by 1934, the year the IRA was enacted. *Id.* The General Allotment Act was, from the tribal point of view, "the most disastrous piece of Indian legislation in United States history ...." W. Canby, *American Indian Law*, 19 (West 1988).

The IRA "repudiated the allotment policy." *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 436 (1989). The IRA was part of an effort intended "to encourage economic development, self-determination, cultural plurality, and the revival of tribalism." *Cohen*, at 147.

Viewed in this context, *American Power & Light Co.*, 329 U.S. at 104, the court of appeal's opinion that the IRA has an "agrarian focus," is overly narrow. South Dakota v. United States, 69 F.3d at 883. The IRA was by no means limited solely to aiding Indians in agrarian pursuits:

> The IRA was also an attempt to improve the economic situation of Indians. The Act was intended to stop the alienation of tribal land needed to support Indians, and to provide for acquisition of additional acreage for tribes. **Tribes were encouraged to organize along the lines of modern business corporations**; a system of financial credit was included to reach this economic objective. **Educational and technical training opportunities were provided, in addition to positions of responsibility for Indians in the federal Indian service**.

Cohen, at 147 (*citing To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 and S. 3645 Before the Senate Comm. On Indian Affairs*, 73d Cong., 2d Sess. (1934)) (emphasis added).

In sum, by failing to give due weight to the IRA's purpose and context, the court of appeal "has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power." S.Ct.R. 10(a).

2. The Secretary Has Interpreted His Authority Under The IRA in a Reasonable And Limited Way

The court of appeal recognized that "[n]ormally delegation questions are considered in light of a statute's legislative history and context, and any narrowing agency interpretation ...." *South Dakota v. United States*, 69 F.3d at 884 (citations omitted). The court of appeal ignored this convention, however, because it erroneously believed that "the agency has interpreted the statute as broadly as possible ...." *Id.* A brief review of the applicable regulations reveals that, to the contrary, the Secretary has interpreted the authority delegated by the IRA in a reasonable and limited way.

The Secretary's new regulation limits his authority to take lands into trust for Tribes. *See* 61 Fed. Reg. 18,081 (1996), *reprinted at* Petitioners' Appendix, at 64a-69a. Specifically, the Secretary must

provide public notice of his final decision to take land in trust at least 30 days before he transfers title to the United States. *Id.* at 69a. One objecting to the Secretary's decision may file suit to challenge the transfer before it occurs. *Id.*

Pre-existing regulations also limit the Secretary's discretion. For on-reservation trust acquisitions, the regulations require the Secretary to notify relevant state and local governments, and give such governments a period of time in which to submit written comments regarding the proposed acquisition's potential impacts on their regulatory jurisdiction, real property taxes and special assessments. *See* 25 C.F.R. sec. 151.10. The regulations contain similar provisions governing trust acquisition of off-reservation lands. *See* 25 C.F.R. sec. 151.11. In addition, the regulations define "Tribe," "individual Indian," and "Indian reservation," in ways that restrict the entities or persons for whom lands may be taken into trust. *See* 25 C.F.R. sec. 151.2(b), (c), (f). Moreover, the Secretary may only acquire land in trust when one of three conditions is met:

> (1) when the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or, (2) when the tribe already owns an interest in the land, or (3) when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

25 C.F.R. sec. 151.3(a).

In sum, far from interpreting his authority under the statute "as broadly as possible," *South Dakota v. United States*, 69 F.3d at 884, the Secretary has interpreted the IRA in a reasonable and limited way. Thus by not considering the delegation question "in light of [the] statute's legislative history and context, and any narrowing agency interpretation," *id.* (citations omitted), the court of appeal "has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power." S.Ct.R. 10(a).

IV. CONCLUSION

The court of appeal failed to consider key threshold questions, ignored settled rules of statutory construction, misread federal regulations, and erroneously concluded that the IRA, 25

U.S.C. section 465, is an unconstitutional delegation of legislative authority. If let stand, that opinion poses a significant threat to Indian tribal self-determination nationwide.

For these reasons, the San Manuel Band respectfully requests that this Court grant the United States Department of the Interior's petition for a writ of certiorari.

Respectfully submitted,

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